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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of )  
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Implementation of the )  
Telecommunications Act of 1996: )  
)  
Telecommunications Carriers' Use )  
of Customer Proprietary Network )  
Information and Other Customer )  
Information )  
)  
)  
Implementation of the Non-Accounting )  
Safeguards of Sections 271 and 272 of the )  
Communications Act of 1934, as Amended )  
)

CC Docket No. 96-115

CC Docket No. 96-149

**REPLY COMMENTS ON REQUEST FOR DEFERRAL  
AND PETITION FOR FORBEARANCE OR STAY**

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## SUMMARY OF ARGUMENT

The CMRS market is characterized by fierce competition among diverse players, growth, and the absence of pervasive regulation. CMRS operators provide a wide range of services and equipment to their subscribers in an intensely competitive wireless services environment. This unique competitive dynamic is threatened by CPNI rules that follow the recent pattern of Commission regulation — treating all telecommunications carriers identically, regardless of important differences in their markets, and thus creating inefficiency and competitive problems. The Commission's single size solutions severely harm carriers operating less traditional and competitive markets because they force conformance to "lowest common denominator regulation" aimed at addressing the monopoly dynamics of the local exchange market. Rather than being forward-looking, this approach simply imposes the baggage of the past on the carriers of the future.

Accordingly, Comcast supports the CMRS-related relief sought by CTIA and GTE in their respective petitions, and further suggests that *all* CPNI rules be stayed or deferred as they pertain to CMRS carriers for 180 days pending a reevaluation of their appropriateness. CMRS carriers have never before been subject to formal restrictions on their use of CPNI and would have to engage in a costly and wasteful process of modifying nearly all aspects of how they do business to comply with the new CPNI rules. The comments overwhelmingly support a delay in enforcing the CPNI rules on CMRS carriers because CMRS customers will suffer significant service disruptions under the Commission's narrow interpretation of the scope of the existing CMRS carrier-customer relationship, which unduly restricts CMRS carrier use of CPNI. For

example, the new CPNI rules ignore the reality that CMRS-specific CPE is an integral part of CMRS service and has always been provided on that basis. The Commission must analyze the business realities associated with rendering CMRS service and must vary its rules to conform to the results of its analysis. While the Commission correctly concluded that CMRS is one of three distinct categories of telecommunications service, it did not perform this level of analysis. A short delay in the effective date of the rule would allow time for this inquiry without imposing needless burdens on CMRS carriers and their customers.

The comments in support of deferral also have demonstrated substantial confusion over important threshold issues such as what constitutes aggregate information versus CPNI. The current rules appear to permit providers to collect and analyze aggregate customer usage data, but prohibit them from applying this information to enhance customers' use of services. Carriers must have a clear understanding of what constitutes aggregate information and how it can be used in the carrier's relationship with existing customers. Until this has been clearly delineated by the Commission, CMRS carriers should not be penalized for pursuing programs or promotions that are based on good faith interpretations of current rule requirements.

Commenters also widely identified the potentially negative impact of the CPNI rules on current CMRS customer retention practices. CMRS customer care departments are trained to review the CPNI of a departing or dissatisfied customer to determine whether there is a service package that better suits the customer's needs. While the rules appear to permit this use of CPNI, they do not appear to permit use of CPNI to win back a "former" customer. In CMRS, as in all other normal business settings, customers expect and want their network usage information to be

analyzed in a "former customer" win back situation. Further, failure to permit this use will create perverse incentives for CMRS carriers to churn each other's customers rather than concentrating their marketing energies on new customers and competition with the landline market.

Because the new CPNI rules will require total redesign of nearly every aspect of how CMRS service is marketed, a time limited deferral of the rules as to CMRS is critically necessary. CMRS carriers cannot redesign the basic way they provide service and develop and implement CPNI compliance programs in 30 days. Thus, the Commission should exercise its public interest powers to delay the effective date of the rules pending reconsideration or forbear enforcement of the rules with respect to the CMRS industry.

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**REPLY COMMENTS ON REQUEST FOR DEFERRAL  
AND PETITION FOR FORBEARANCE OR STAY**

Comcast Cellular Communications, Inc. ("Comcast") by its attorneys, hereby submits its reply comments in support of the numerous comments requesting that the FCC defer effectiveness of its Customer Proprietary Network Information ("CPNI") rules pending further review.<sup>1/</sup> Both the wide spectrum of support for deferral and the serious questions raised about

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<sup>1/</sup> The Cellular Telecommunications Industry Association ("CTIA") and GTE filed initial requests to postpone the effective date of several rules adopted in the Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, *Second Report and Order and Further Notice of Proposed Rulemaking*, CC Docket Nos. 96-115, 96-149, FCC 98-27 (rel. February 26, 1998) ("*Second Report and Order*"). Every commenter (with the exception of MCI) appears to agree the CPNI rules should be reexamined as to their appropriateness for CMRS carriers prior to coming into effect. See, e.g., *Comments of SBC Communications, Inc.*, CC Docket No. 96-115, (May 8, 1998) at 27, (Issues raise such serious public interest concerns that the FCC should forbear from or defer the effective date of portions of the CPNI Order.); *Comments of Vanguard Cellular Systems, Inc.*, at 1, ("[T]he Commission should further study the likely impact of its CPNI rules on CMRS and CMRS customers and providers *before* those rules go into effect so that the Commission can make an informed decision about how its rules

the applicability of the rules require that the Commission postpone the effective date of the rules for CMRS to avoid the obvious disruption and irreparable harm that application of the rules would visit upon CMRS customers and their carriers.

## I. INTRODUCTION

As many thoughtful observers of the telecommunications industry are recognizing, attempts by the Commission to develop a single set of rules to govern a telecommunications marketplace as diverse as that which exists in the U.S. simply cannot work. Wireline local, long distance and CMRS markets are all in different stages of competitive development and have different structures, facilities and practices. As Commissioner Powell stated in a recent speech before the America's Carriers Telecommunications Association:

We write one-size-fits-all policies based on the experiences, data and promises of the big guys, we short-sightedly cut deals with one or two large companies, and, fatally, we measure the success of competition, new market entry, innovation of services, and prices by what these giants are doing. It has almost always been that we learn the most about what drives competition and innovation by more modest-sized, hungry companies infected with the American entrepreneurial spirit.<sup>2/</sup>

CMRS is a market characterized not by the overwhelming dominance of the "big guys" but by fierce competition among numerous carriers of all sizes. Traditionally it has been a market with room for "giants," regional players, and small and niche carriers. It has grown and

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should apply to the unique service relationship that CMRS providers have with their customers."); *Comments of U.S. West Communications, Inc.*, at 16-17, (Public interest demands deferral of the FCC's rules for at least 180 days or forbearance until after the reconsideration process is concluded.)

<sup>2/</sup> Commissioner Michael K. Powell, Speech before the America's Carriers Telecommunications Association, (December 15, 1997) at 5.

prospered without pervasive regulation, and therefore has developed differently than more traditional telecommunications markets and in many respects more efficiently. Unfortunately, over the past couple of years this competitive dynamic has been threatened by what appears to be the Commission's new view that all telecommunications carriers must be treated identically and without reference to the factual predicates of their markets (e.g., level of competition, license structure, ownership, technology utilized, penetration levels or historical market development).

No matter how well intentioned a regulation's objective, the failure to take into account the dynamics of distinct markets and to adjust policies accordingly inevitably leads to inefficiencies and competitive problems.<sup>3/</sup> And as Commissioner Powell observed, most often the "one-size" solution is tailored to the "big guys" and will have a greater negative impact on "smaller" carriers or on the less traditional marketplace. At best, "one-size-fits-all" means that innovative and increasingly competitive marketplaces such as CMRS always will be "leveled down" due to the past transgressions and current monopoly dynamics of the local exchange market. Rather than rewarding a marketplace which now has facilities-based competition and declining prices, and encouraging the development of wireless competition to the landline local loop, treating carriers identically across markets increasingly shackles the CMRS industry and does disservice to its carriers and customers alike.

The Commission's approach to CPNI as it relates to CMRS carriers must be reevaluated prior to those rules taking effect. Comcast supports the CMRS-related relief sought by CTIA

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<sup>3/</sup> Comcast has yet to identify any language in any provision of the Communications Act which instructs the Commission *not* to make rational distinctions based upon analyses of existing marketplaces and the projected impact of its rules. Nor has Comcast found any language mandating "uniform" rules irrespective of their consequence.



and GTE in their respective petitions, and further suggests that *all* CPNI rules be stayed or deferred as they pertain to CMRS carriers for 180 days pending such reevaluation.<sup>4/</sup>

As described by CTIA, GTE and the many commenters, CMRS operators provide a wide range of services and equipment to their subscribers in an intensely competitive wireless services environment.<sup>5/</sup> CMRS customers will suffer significant service disruptions if the Commission narrowly interprets the scope of the existing CMRS carrier-customer relationships and unduly restricts CMRS carrier use of CPNI to render service to CMRS customers.

CMRS-specific deferral of the CPNI rules is justified. CMRS carriers already have *competitive* incentives to protect their customers' CPNI. Further, CMRS carriers have never before been subject to formal restrictions on their use of CPNI to: 1) market CPE necessary to render CMRS service; 2) identify groups of customers likely to want new services or service packages based on analysis of aggregate information; and 3) limit CMRS carrier ability to effectively communicate with former customers to win them back. The comments uniformly agree that CMRS carriers would have to engage in a costly and wasteful exercise of modifying nearly every aspect of how they do business to comply with these new CPNI rules. They also

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<sup>4/</sup> Comcast supports requests for deferral of 180 days with the understanding that full reconsideration of the CPNI rules can be completed in that timeframe. Alternatively, forbearance from the CPNI rules for CMRS carriers would accomplish the same basic objective.

<sup>5/</sup> See, e.g., *Comments of United States Cellular Corporation*, at 4-5, ("[W]ireless customers expect a wide variety of 'bundled' services, especially including free or reduced price telephones . . . ."); *Comments of Sprint Spectrum L.P.*, at 3-4, ("The CMRS industry is marked by an increasing number of competitors . . . . Wireless equipment and a wide variety of wireless offerings have always been a part of the CMRS-customer existing service relationship . . . . Mobile technologies integrate a variety of related services . . . ."); *Comments of Omnipoint Communications, Inc.*, at 21, ("[A]ll wireless providers are engaged in a vigorous price and service competition . . . .").

demonstrate that the new rules as applied to CMRS are sufficiently confusing as to permit reasonable people to come to contrary conclusions about the permissibility of common CMRS marketing practices. Such a situation calls out for deferral of the rules to consider these circumstances.

## II. UNLIKE TRADITIONAL LANDLINE COMMUNICATIONS, CMRS SERVICE AND CMRS EQUIPMENT ARE INEXTRICABLY LINKED

There is nearly total agreement among commenters that CTIA's portrayal of how CMRS-specific CPE is an integral part of CMRS service is accurate.<sup>6/</sup> CTIA and commenters have also accurately described some of the disruptions CMRS customers will face as carriers attempt to divide "telecommunications services" from the equipment necessary to render CMRS service.

For example, CMRS carriers routinely integrate their offering of telecommunications services with the offering of a particular type of phone that is necessary to the rendering of the service. Comcast, like other CMRS providers, provides its customers with free or deeply discounted CPE as a tool to promote its services, particularly new high capacity digital services.<sup>7/</sup> Products can be offered as "loss leaders" or retention tools to find and keep customers or as gifts

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<sup>6/</sup> Even MCI does not object to CTIA's assertion that CMRS equipment and service is provided on a somewhat different basis than landline CPE. *See Comments of MCI Telecommunications Corporation*, at 1-2.

<sup>7/</sup> As many commenters noted, it furthers the public interest for CMRS providers to use CPNI to identify customers who should receive information about new or improved CMRS-related services (such as digital services). *See, e.g., Comments of PrimeCo Personal Communications, L.P.*, at 6, (CMRS customers expect to be advised of new services and equipment appropriate to their needs. This cannot be accomplished without use of CPNI; thus, prohibitions on this use of CPNI are not in the public interest.) and *Bell Atlantic Mobile, Inc.*, at 6 (Marketing of state of the art features and services through use of CPNI benefits subscribers.).

to selected customers for participating in pilot groups for new services or in market research studies. Customers benefit tremendously from competitive availability of these products and services, which may be provided at or below cost with a goal of maintaining a customer account that is profitable as a whole.

The Commission's analysis of Section 222 draws a strict line between allowable carrier use of CPNI to initiate and render services classified as "telecommunications services" and prohibited use to offer services or equipment classified as CPE, information services or other non-telecommunications service. However, as commenters have observed, Section 222 is written flexibly enough to allow the FCC to determine that a use of CPNI is permissible if a carrier is rendering services necessary to or used in the provision of a particular telecommunications service.<sup>8/</sup> Indeed, Section 222(c)(1) defines the parameters of permissible CPNI use that may be inferred by an existing customer-carrier relationship:

[A] telecommunications carrier that receives or obtains [CPNI] by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision *of such* telecommunications service. . . .<sup>9/</sup>

By its direct language Section 222 requires evaluation of *each* "telecommunication service" to determine what services are "necessary to . . . the provision of" *that* service and what other services are "used in the provision of" *those* telecommunications services. The results of this

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<sup>8/</sup> See, e.g., *AT&T Comments*, (Marketing of mobile handsets is permitted under Section 222 because it is a part of the service or necessary to or used in providing the service.).

<sup>9/</sup> 47 U.S.C. § 222(c)(1).

analysis must then be used to tailor appropriate rules for each category of service. As the results of this analysis will vary for each category of telecommunications service, so must the applicable CPNI rules.

Although the Commission concluded that there are at least three distinct categories of telecommunications service -- long distance, local and CMRS -- it did not individually analyze and adopt rules that fit each of these service categories.<sup>10/</sup> As a result of this approach, the CPNI rules relating to permissible use, not surprisingly, are ill-suited to CMRS service delivery. The comments demonstrate that CMRS carriers historically have bundled service with customer handsets. Customers expect CMRS carriers to engage in this pro-competitive practice that improves CMRS customer service and provides customer savings. In interpreting the scope of Section 222(c)(1) as it applies to the CMRS category, the Commission must accord some weight to these customer expectations. Lumping together all three distinct telecommunications service categories that have distinct histories and ways of conducting business simply leads to a flawed analysis of service-specific customer needs and expectations.<sup>11/</sup>

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<sup>10/</sup> Comcast is mindful of the FCC's optimistic observation that over time carriers will expand into one another's service categories and the distinctions will blur. While this may happen eventually, the CPNI rules will apply to today's world where carriers do not provide all services to an individual customer.

<sup>11/</sup> While incumbent LECs are attempting to use the serious and immediate problem CTIA has identified as a means to secure relief from CPNI rules for new landline services that require service-specific CPE, the FCC should not confuse these different circumstances. CMRS carriers face an immediate crisis involving their basic modes of conducting business. ILECs, in contrast, can only point to services they plan to introduce and cannot make the case that the CPNI rules that limit use of CPNI for non-telecommunications services will cause the widespread disruption of existing services and marketing as in the CMRS market.

### III. SUBSTANTIAL CONFUSION SURROUNDS THE FCC'S DECISION ON USE OF AGGREGATE INFORMATION

Further, the comments demonstrate that CMRS carriers need to gather and analyze detailed data on their customers' usage of services to make ongoing evaluations of what services and service packages are effective for particular groups of customers. CMRS carriers have spent years assembling critical competitive information on how their customers use CMRS services; nevertheless, the CPNI rules appear to have significantly limited the ways CMRS carriers can use aggregate information to design and market new products and services.<sup>12/</sup> Without the use of CPNI as a means of identifying customers who might benefit from new service programs, Comcast (like other CMRS providers) will be in the unusual position of being permitted by CPNI regulation to collect and analyze aggregate customer usage data, but be entirely unable to apply this information to enhance its customers' use of its service.

Because the scope of permissible use of carrier-generated aggregate information is so important and because there is confusion concerning such basic issues as whether a grouping of customer's name and address are considered aggregate information or CPNI, the Commission should take the time to carefully delineate both what constitutes aggregate information and how it can be used by a carrier in its relationships with existing customers.<sup>13/</sup> In the absence of this

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<sup>12/</sup> Several commenters alternatively suggest that some customer-specific uses of aggregate CPNI are permissible or that the rules plainly permit uses that other commenters find potentially problematic. At the very least these diverse views demonstrate the urgent need for immediate clarification or deferral pending resolution.

<sup>13/</sup> The FCC cannot abdicate its responsibility to provide this analysis by asserting that customers that want their CPNI to be used for these purposes will readily provide the CMRS carrier with the requisite permission. BAMS, for example, notes the time lag and poor response inherent in efforts to obtain customer consents. *See Comments of Bell Atlantic Mobile, Inc.*, at 4.

necessary guidance, Comcast agrees with GTE that CMRS carriers should not be penalized for pursuing programs or uniformly and objectively applied promotions targeting customers fitting particular profiles that are based on good faith interpretations of current rule requirements.<sup>14/</sup>

#### **IV. CUSTOMERS HAVE AN EXPECTATION THAT CMRS CARRIERS WILL USE RELEVANT AND SPECIFIC INFORMATION TO RETAIN THEIR BUSINESS**

The comments illustrate widespread concern that the new CPNI rules also will have a serious negative impact on current CMRS customer retention practices. In this intensively competitive industry, CMRS carriers contacted by a dissatisfied or a departing customer are trained to refer to a customer's usage history to assess whether the customer can be offered a more desirable service package. As several commenters point out, the rule appears to permit use of CPNI in the context of satisfying an existing customer, but does not permit use of CPNI to win back a former customer. Common sense suggests that this distinction is one that customers do not make, and GTE has demonstrated in its Petition that it is not a distinction required by Section 222. In fact, CTIA, GTE and many CMRS commenters have demonstrated that CMRS customers expect and want their network usage information to be analyzed in a "former customer" win back situation.<sup>15/</sup> Win backs should be permitted because they promote competition.

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<sup>14/</sup> See *GTE Comments* at 5.

<sup>15/</sup> No business that ever seeks to win back previous customers could ever win them back if they did not know something about the customer and the source of the customer's decision to replace its services with the services of another. On a practical level, if the lawn service company that you fired last year solicits your patronage this year you would be unlikely to even listen to a sales pitch until they first acknowledge your prior concerns. The CPNI rules place carriers in a position of essentially having to "cold call" former customers.

Customer retention is a critical aspect of customer service in competitive industries.

Competing carriers typically elicit CPNI-related information from the customer in the process of making their sales pitch and structuring a competing package to woo a new customer.

Restrictions on the use of CPNI in win-back efforts handicap only the carrier that the customer is leaving and prevent that carrier from making an attractive counter offer. The ordinary back and forth process of offer and counter offer results in zealous competition among carriers and concomitant consumer benefits. It is also what the CMRS customer has come to expect. In fact, given the competitive dynamics of the CMRS industry, restrictions on a carrier's ability to call back a former customer and make effective service offers simply will encourage CMRS carriers to poach on one another's existing customers rather than increase existing penetration levels and invest important resources into breaking into new markets such as the landline market. The FCC will have created a situation where it is easier and more cost effective for a carrier to churn another carrier's customer than it is to sell a new customer on CMRS. The Commission should not tilt this balance in the CMRS industry and certainly should not do so without a CMRS-specific record to support its decision.

## **V. CONCLUSION**

It is beyond dispute that all carriers have a duty to protect CPNI from unauthorized uses. It is unnecessary and wasteful, however, to require all carriers to protect CPNI in the same exact manner regardless of the characteristics of the particular category of telecommunications service a carrier offers and the characteristics of its market. Uniform application of the new CPNI rules would force CMRS carriers to alter virtually every aspect of the way they conduct business.

It is no small feat to expect CMRS carriers to redesign the basic way they provide service and to develop and implement a CPNI compliance programs in 30 days. The comments overwhelmingly have demonstrated the disruption and inconvenience that the FCC's interpretation of Section 222(c)(1) will cause CMRS customers.<sup>16/</sup> At the very least, the FCC should assist carriers striving to comply with the rules by clarifying that CMRS carriers may use CPNI to market digital services that include digital phones, remove confusion over what is and is not aggregate data and spell out permissible uses that are plainly within the realm of the CMRS customer-carrier relationship. Finally, a more searching analysis of normal customer retention policies and basic customer expectations should accompany FCC clarification of CPNI use related to customer win back situations.

As the FCC reviews these critical issues, Comcast reiterates that regulatory parity does not mean that differently situated carriers either must or should be treated the same. Such an approach would be an abdication of the Commission's responsibility to understand the impact of its regulations on the industries it regulates. Rather, the FCC should be cautious about the economic inefficiencies and other negative impacts of imposing rules suited to monopoly and near monopoly telecommunications providers on the robustly competitive wireless industry.

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<sup>16/</sup> They also have demonstrated that the FCC's interpretation of Section 222(c)(1) is flawed.



Under these circumstances, the best course for the Commission is to delay the effective date of its rules using its public interest powers or to apply forbearance to the CMRS industry. A limited delay pending this review preserves the *status quo* and also preserves intact the customer expectations developed over many years related to their CMRS carriers' use of their CPNI.

Respectfully submitted,

**Comcast Cellular Communications, Inc.**

A handwritten signature in dark ink, appearing to read "Jeffrey E. Smith", is written over a horizontal line.

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May 13, 1998

## **CERTIFICATE OF SERVICE**

I, Joslin Arnold, a secretary at Dow, Lohnes & Albertson, PLLC, do hereby certify that on this 13th day of May, 1998, a copy of the foregoing "Comcast Cellular Communications, Inc. Reply Comments" was sent by hand delivery to the following:

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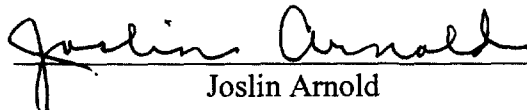
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